SITT TATT BHD

v.

FLORA GNANAPRAGASAM & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
RAUS SHARIF J
[COURT REVIEW NO: R1-25-08-2002]
20 SEPTEMBER 2005

ADMINISTRATIVE LAW: *Remedies - Certiorari, application for - To quash award of Industrial Court - Whether chairman had undertaken sufficient judicial appreciation of evidence adduced - Evidence Act 1950, s. 114(g) - Whether rightly invoked - Whether company guilty of dereliction of duties - Whether there was a breach on the implied terms of contract of employment - Whether chairman rightfully concluded that first respondent was constructively dismissed - Whether Industrial Court had erred in law or acted in excess of jurisdiction*

LABOUR LAW: *Employment - Constructive dismissal - Sexual harassment - Whether proved - Whether chairman had undertaken sufficient judicial appreciation of evidence adduced - Evidence Act 1950, s. 114(g) - Whether rightly invoked - Whether company guilty of dereliction of duties - Whether there was a breach on the implied terms of contract of employment*

This was an application by the applicant for an order of *certiorari* under O. 53 of the Rules of the High Court 1980 to quash the Industrial Court's decision that the first respondent was constructively dismissed, and ordering the applicant to pay backwages *in lieu* of reinstatement. The first respondent was a personnel executive in the human resources department of the company at the material time. It was the first respondent's claim that she was forced to write a letter of resignation due to acts of sexual harassment by one Sivananda. The applicant herein submitted that the first respondent's sexual harassment claims should have been rejected by the Industrial Court because her allegations contained inconsistencies. The issues that arose were (1) whether the chairman had undertaken sufficient judicial appreciation of the evidence adduced before him before accepting the evidence of the first respondent; (2) whether the chairman had rightly invoked s. 114(g) of the Evidence Act 1950; (3) whether the company was guilty of any dereliction of duties and (4) whether the chairman was right to conclude that there was a breach on the implied terms of the first respondent's contract of employment and that first respondent was entitled to claim constructive dismissal.

Held (dismissing the application):

[1] The findings of the chairman were findings of facts based on the witnesses he had seen and heard. It was trite law that findings of facts of the Industrial Court could not be impugned in the judicial review proceedings and *certiorari* could not be used as a disguise to appeal from findings of facts. Once there was evidence to support a finding of fact, the reviewing court should not interfere with it. Further, it was not the reviewing court's function to interfere with the sufficiency of evidence. The chairman had undertaken sufficient judicial appreciation of the evidence adduced before him and chose to accept the evidence of the first respondent. He had given reasons for the choice he made and this court had no valid reason to interfere. (p 528 f-h & 529 a)

[2] It was clear from the award that one of the reasons why the chairman had accepted evidence of the first respondent was because of the failure of the applicant to call three relevant witnesses namely, Sivananda, one Desmond Yeap and one Nik Murad, who were the Senior Management Officers. This court was in complete agreement with the chairman that s. 114(g) of the Evidence Act was rightly invoked against the applicant. (p 529 e)

[3] On the issue that there was a delay on the part of the first respondent to raise the claims of sexual harassment and failure to lodge a police report, it was evidenced that the first respondent had raised the issue with Desmond Yeap and Nik Murad, senior management officers of the company. However, no action was taken by both of them to protect the first respondent. This court agreed with the chairman's finding that the two said officers were guilty of dereliction of their duties in not taking any remedial measures. (p 529 g-h)

[4] The chairman was right when it concluded that there had been a breach on the implied terms of the first respondent's contract of employment. It followed that the chairman was also right to conclude that the first respondent had been constructively dismissed by the applicant. The Industrial Court had not made a perverse finding or erred in law or acted in excess of jurisdiction. (p 530 d-e)

Case(s) referred to:
MBf Unit Trust Management Bhd v. Mahkamah Perusahaan Malaysia & Anor [2004] 5 CLJ 391 HC ***(refd)***
Palmolive (M) Sdn Bhd v. Yap Koh Foong & Anor [2001] 2 MLJ 600 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 114(g)
Rules of the High Court 1980, O. 53

For the applicant/appellant - Thavalingam Thavarajah; M/s Zaid Ibrahim & Co
For the respondent - Satish Nair; M/s Satish Nair & Assoc

Reported by Suhainah Wahiduddin

JUDGMENT

Raus Sharif J:

This is an application for an order of *certiorari* under O. 53 of the Rules of the High Court 1980 (RHC) by the applicant to quash Award No. 998 of 2001 handed down by the Industrial Court on 14 December 2001. The Industrial Court found that the first respondent was constructively dismissed by the applicant and consequently the applicant was ordered to pay the first respondent back wages *in lieu* of reinstatement in the sum of RM48,680.

The applicant is a company registered under the laws of Malaysia and operates from Suite 8-3 8th Floor, Wisma Chase Perdana, Off Jalan Semantan, Damansara Heights, 50490 Kuala Lumpur. The first respondent is Flora a/p Gnanapragasam.

The first respondent joined the services of the applicant as Personnel Executive in the Human Resources Department with effect from 1 October 1996. At the material time her immediate supervisor was one Sivananda Manickam (Sivananda), the Senior Manager of the Human Resources Department of the applicant.

On 6 May 1998, the first respondent tendered her resignation. She claimed that she was forced to write the letter of resignation due to acts of sexual harassment by Sivananda. Hence, she claimed she was constructively dismissed by the applicant.

The following are summaries of incidents of sexual harassments adduced by the first respondent before the Industrial Court:

The 1st Incident

During a overnight trip to Penang for official purposes on 10 July 1997 and after work for that day, Sivananda had invited the first respondent to spend the night with him in his hotel room although they were already accommodated in separate rooms. This call was made very late at night when first respondent was already sleeping. Although the first respondent had declined the invitation, Sivananda had nevertheless telephoned the first respondent again requesting that she changed her mind. The first respondent refused again.

The 2nd Incident

During another trip to Penang for official purposes (recruitment drive) on 2 August 1997 Sivananda had asked the first respondent to meet up with him at the lobby of the hotel and to spend time with him. Again the first respondent declined the request and told him off.

The 3rd Incident

On 30 December 1997, Sivananda had asked the firsts respondent to meet him at the restaurant/bar "TGIF" in Subang Parade after office hours to discuss office matters. The first respondent refused but he insisted stating that it was very important. The first respondent then met Sivananda and during the meeting, instead of discussing office matters, it became a monologue where Sivananda talked of his hobbies, his likes and dislikes but nothing related to work. Bored with his conversation the first respondent insisted on leaving. He was upset stating that one hour was too short but he had no choice and suggested having another meeting with her on New Year's eve on 31 December 1997 at Sentul Pasar, at his friend's house. He would even arrange for a half-day off for her that day. The first respondent again declined to go.

Nothing happened after this. Work was as usual until 19 March 1998.

The 4th Incident

On 19 March 1998, Sivananda called the first respondent for discussion on her performance where he commented not only on her performance but on her dress and also her behaviors that she was rude and never smiled. Basically he said the first respondent was no good and could be put in the cold storage. He even told her that if she did not follow his style of work she could be put in the 'cold storage'. He requested her to think over for a few days but the subject was never brought up again.

The 5th Incident

Sometime during mid-April 1998, Sivananda had instructed the first respondent to make another trip with him to Penang for official purposes in his car. When informed by the first respondent that she had made her own travel arrangements and would bear the expenses thereof, Sivananda had shouted at

the first respondent in the presence of other colleagues saying that she cannot make travel plans on her own without his prior approval. Being on official duty she left for Penang regardless but on her own.

The 6th Incident

Later after the 5 incidents above, at Penang the first respondent met Sivananda at the Penang office. After working the whole day, Sivananda asked about the overnight accommodation and on being informed by the first respondent that she had booked on her own Sivananda became very furious – his face was as 'black as thunder' and ordered the first respondent to go back home. The first respondent had no choice but to take the evening flight back to Kuala Lumpur. She reported to Desmond Yeap the next morning on Sivananda's treatment and attitude towards her ever since the hotel incident in 1997.

The 7th Incident

On 2 May 1998, an appraisal for 1997 was conducted in respect of the first respondent by Sivananda and not only was the appraisal adverse to her but a direct contrast to the one made in the previous year. In addition the first respondent was given a list of tasks to be completed on a monthly basis for three months which was never assigned before.

On the following day, 3 May 1998, when the first respondent was preparing to go to the Immigration Department for official purposes, Sivananda shouted at her in the presence of other colleagues saying that she had not informed him of her plans but should have given him her plans or itinerary and not leave the office as she pleased.

In her evidence the first respondent also testified that she has approached Desmond Yeap, the Senior Manager Operation of the applicant, and told him of all the incidents with regard to Sivananda but according to her Desmond Yeap did not take any step to rectify the situation. Further according to the first respondent, she was called by the Executive Director Nik Murad Nik Khamil (Nik Murad) who heard about her complaints of the sexual harassments by Sivananda, but there was no follow-up action taken by him.

The first respondent also testified that Nik Murad subsequently called her for a discussion some three days after she had tendered her letter of resignation. According to her, Nik Murad promise to investigate but nothing came out from the promise. Further, according to the first respondent, sometime in mid May, Desmond Yeap arranged for an appointment to meet her to discuss about the same. They met at Petaling Jaya Hilton. According to the first respondent, instead of giving support to her plight, he asked her to sign a disclaimer of all her claims against the applicant.

At the hearing before the Industrial Court the applicant did not call Sivananda to rebut the complaints made by the first respondent. Neither Desmond Yeap or Nik Murad were called by the applicant.

Before me, it is the submission of the applicant that the first respondent's claims that she was sexually harassed by Sivananda, should have been rejected by the Industrial Court. This is because as argued by learned counsel for the applicant that the first respondent allegations contained the following inconsistencies:

(i) The first respondent could not remember the hotel where the 1st and 2nd incidents took place. If the first respondent had viewed the alleged incidents in such a grave and serious manner, she certainly would have at least recalled the name of the hotel.

(ii) On the morning following of the 1st incident, the first respondent had in fact admitted to having breakfast with Sivananda. If the first respondent had viewed the alleged incident in such a grave and serious manner, she would not have had breakfast with Sivananda but instead, would have expressed her anger or disappointment to him, which she failed to do.

(iii) In respect of the 3rd incident, it should also be noted that the first respondent had met Sivananda at 'TGIF' in Subang Parade. She could have declined the invitation as she claimed to have done during the 1st and 2nd incidents, but she chose to meet Sivananda and had actually stayed for an hour.

(iv) In respect of the 7th incident, the first respondent had agreed that Sivananda was angry with her because she did not seek his approval to go to the Immigration Department and that he had every right to enquire about her whereabouts during office hours. But, the first respondent said that Sivananda should not have shouted at her. In contradiction to that, the first respondent had also testified that Sivananda is a person who is 'forever yelling', which could imply that Sivananda's manner of speech during the incident was quite normal. Suzana, the applicant's witness did also confirm during her testimony before the 2nd respondent that Sivananda generally spoke in a loud manner.

(v) The first respondent did not complain to the management of the applicant in respect of the alleged incidents. She had only spoken to Desmond Yeap after the 6th incident, which was approximately eight months after the 1st incident. If the first respondent had viewed the alleged incidents in such a grave and serious manner, or had felt threatened in any way, she should have complained, or at least, spoken to the management of the applicant. This, she had failed to do.

(vi) The first respondent had also testified that she did not lodge any police report against Sivananda. If the first respondent had felt threatened, she certainly would have lodged a complaint, which was not forthcoming from her.

In fact, the same argument was submitted before the Industrial Court. But the Industrial Court chose to believe the first respondent, in that there was in fact several incidents of harassment and annoyance on the part of Sivananda. The learned Chairman made the following findings:

> As regards the 1st incident the conduct of Sivananda is a serious misconduct of sexual harassment against the Claimant the Company's female single employee.
>
> As regards the 2nd incident again it is a serious misconduct of sexual harassment if not a sexual annoyance by Sivananda on his subordinate female employee.
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> As regards the 3rd incident although it may not amount to sexual harassment it was nevertheless an unfair labour practice both having to work after office hours and subjected to annoyance.
>
> As regards the 4th incident the comments by Sivananda were mischievous and annoying.
>
> As regards the 5th and 6th incidents Sivananda's conduct was not only most unbecoming of a superior officer but were intended to harass and embarrass her. And the order to go back home the same evening (from Penang) was to say the least very cruel and a most unreasonable order.
>
> As regards the 7th incident the way the appraisal was conducted was not annoying and the shouting the following day was merely to get back on her and vent his anger for having spurned him.

To me, the above findings of the learned Chairman are findings of facts based on the witnesses he saw and heard. It is trite law that findings of facts of the Industrial Court cannot be impugned in the judicial review proceedings and *certiorari* cannot be used as a disguise to appeal from findings of facts. Once there is evidence to support a finding of fact, the reviewing court would not interfere wit it. And it is not the reviewing court's function to interfere with the sufficiency of evidence. The conclusion of finding is purely left to the Industrial Court and the reviewing court would not interfere merely because the latter might come to a different conclusion. (*Palmolive (M) Sdn Bhd v. Yap Koh Foong & Anor* [2001] 2 MLJ 600 and *MBF Unit Trust Management Berhad v. Mahkamah Perusahaan Malaysia & Anor* [2004] 5 CLJ 391)

In the present case, I find that the learned Chairman has undertaken sufficient judicial appreciation of the evidence adduced before him. He chose to accept the evidence of the first respondent. He gave his reasons for the choice he made and I have no valid reasons to interfere with the findings of facts of the learned Chairman.

It is clear from the award that the reasons why the learned Chairman accepted the evidence of the first respondent was because of the failure of the applicant to call Sivananda, Desmond Yeap and Nik Murad. On this issue the learned Chairman stated as follows:

> The company sought to disprove the claim of harassments through the cross-examination of the claimant without producing the 3 relevant witnesses namely Sivananda, the accused, Desmond Yeap the Senior Manager Operations to whom the complaints were made and also Nik Murad bin Nik Khamil, the Executive Director who interviewed the claimant in this matter. The reason for not bringing them in this hearing is that they had left the company and are not traceable. However from the statement made by the company's witness Gowmathy Dewi, COW2 the Company Legal Officer, only little effort was made to serve them with the notice of hearing, least of all with subpoenas. Subpoenas was applied for on Desmond Yeap and Nik Murad but no attempt was made to serve on them. As regards to Sivananda no attempt at all was made to get him to come to court. In words of COW2, "As for Siva his address uncertain. Did not send anyone to check Siva on his last known address or home". Thus the provision of s. 114(g) of the Evidence Act can be validly invoked against the Company.

I am in complete agreement with the learned Chairman. Section 114(g) of the Evidence Act was rightly invoked against the applicant.

On the issue that there was a delay on the part of the first respondent to raise the claims of sexual harassment and the failure to lodge a police report, the learned Chairman addressed it in the following words:

> Does the law require the claimant in such a situation to lodge a report to the police. If it is, what then are the functions of Desmond Yeap and Nik Murad as Senior Management Officers of the company or both the claimant and Sivananda. The Court find it is not the claimant who is guilty of any dereliction but these two officers who were guilty of dereliction of their duties in not taking any remedial measures. The facts showed they had connived and condoned the acts Sivananda.

Again I am in full agreement with the learned Chairman. It is evidence that the first respondent did raise the issue with Desmond Yeap and the same was within the knowledge of Nik Murad. But no action was taken by both of them to protect the first respondent.

On the issue whether the several incidents of harassments and annoyance and non-action on the part of the higher management of the company to react on the complaints by the first respondent constituted a breach on the implied or/ and express terms of the contract employment, learned Chairman put it in the following words:

> To my mind the single incident at the hotel in Penang on 10 July 1997 was a sufficient cause for the claimant but only if she had reported officially to the company. But wisely or otherwise she preferred to keep quite about the incident hoping it would be a 'one-off incident'. In fact the court is pleased that the claimant did not exhibit her anger the next morning at breakfast but had carried on her official task as though nothing had transpired the previous night. Nothing exacting happened until one month later. It happened again 4 months later in December followed by another 3 months later in Mid-April. Yet another on 2.5.1998 which broke the camel's back. She wrote a letter of resignation.

To me, the learned Chairman was right to conclude that there has been a breach on the implied terms of the first respondent's contract of employment. It follows that the learned Chairman was also right to conclude that the first respondent had been constructively dismissed by the applicant.

In conclusion, I am of the view that the Industrial Court in handing the Award No. 998 of 2001 had not made a perverse finding or erred in law of acted in excess of its jurisdiction. Accordingly, the applicant's application is hereby dismissed with costs.